IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL SECOND APPEAL No. 66 of 1987

INDER SINGH JHALA
V/S
PARAS RAM & ORS.

Mr. MANOJ BOHRA, for the appellant / petitioner

Mr. BL SHARMA, for the respondent

Date of Order : 21.7.2006

HON'BLE SHRI N P GUPTA,J.

JUDGMENT

This appeal has been filed by the defendant No.1 against the judgments and decrees of the two learned Courts below decreeing the plaintiff's suit for possession.

The facts of the case are, that the eight plaintiffs filed the suit against four defendants, pleading inter-alia, that the property described in para-1 of the plaint belongs to the plaintiff, which was mortgaged by plaintiff No.1 and 2 to defendant No.1 on 1st Chaitra Sud 2 Samvat 2021, by way of usufructory mortgage for a sum of Rs.550/-, and possession was also delivered to the mortgagee. Thereafter, the mortgagors time and again requested the mortgagee to redeem the property but to no good. It was then pleaded, that the property originally belonged to deceased Nagjiram, and his sons Nathulal and

Narayan, who constructed Nohra in Samvat 1996-97, and since then they were in possession of the property, till mortgage with the defendant No.1. It is then pleaded, that Nagjiram was the ancestor of the plaintiffs and defendants No.2 to 4, and since defendant No.2 to 4 did not agree to be the plaintiff, they had been impleaded as defendants, being heirs of Nagjiram, in order to prevent raising of any possible objection. Then in para-10 it is pleaded, that when notice was sent to the mortgagee to redeem the property, in reply, the factum of mortgage was denied, and therefore, it was alternatively pleaded, that since the defendant has no right, title and interest in the property, the plaintiffs being owners are entitled to recover possession of the property from the defendant. The suit was valued at Rs.550/-, being the mortgage amount, and a court fees of Rs.41.25 Paisa was paid. With these averments, it was prayed, that a decree for redemption be passed, and in the alternative, if the plaintiffs fail to prove the mortgage, even then the possession of the property be ordered to be delivered to the plaintiff.

The mortgagee defendant No.1 filed a written-statement, controverting the plaint averments, and pleading, that the property is not of the ownership and possession of the plaintiffs, rather it is the answering defendant, who has spent a huge amount and, constructed the houses, and is of its ownership and possession. Factum of

mortgage was denied, and it was denied that the answering defendant is in possession as a mortgagee. Then it was pleaded, that notice sent on the side of the plaintiff was received and was appropriately replied. Then in additional pleas it was pleaded, that the property is of the ownership and possession of the answering defendant, he has made investment to the extent of Rs.5000/-, to which the plaintiffs never raised any objection, and therefore, had the property been of the ownership of the plaintiffs, they would have objected at that time itself. Then it was pleaded, that contending the defendant to be mortgagee and in the alternative, trespasser, are inconsistent stand. Then the suit was pleaded to be time barred also. It was pleaded, that since the alleged mortgage is not registered, suit for redemption cannot be maintained, and similar other objections were also taken.

Learned trial Court framed 9 issues. The first issue related to the question, as to whether the plaintiff No.1 and 2 mortgaged the property to defendant No.1 by way of usufructory mortgage on 1st Chaitra Sud 2 Samvat 2021 for a sum of Rs.550/-, and since then the defendant is continuing in possession as mortgagee. The issue No.2 related to the question of plaintiffs' entitlement to redemption. Then issue No.3 related to the question of pecuniary jurisdiction of the Court, in view of the valuation of the property being Rs.6000/-. Then issue No.4

related to maintainability of the suit for redemption in view of the mortgage being unregistered. Then issue No.5 was about entitlement of the plaintiff to get possession, in view of his ownership in the event of issue No.1 being decided against the plaintiff. Then issue No.6 related to limitation, issue No.7 was about the defendant having spent Rs.5000/- on property, and its effect. Then issue No.8 was on the question, as to whether the constructions were made within the knowledge of the plaintiffs, and if so, what is the effect. During trial, the plaintiffs examined 11 witnesses including the plaintiff, while the defendant examined four witnesses including himself.

Learned trial Court decided issue No.1 against the plaintiff, holding that the plaintiff has failed to prove the mortgage. Obviously therefore, issue No.2 also decided against the plaintiff. Then deciding issue No.3 it was held, that even according to the defendant, he is said to have invested Rs.5000/- and thus, the property, except investment was only worth Rs.1000/-, and since the plaintiffs wanted their original property, the issue was decided in favour of the plaintiff. Then issue No.4 was decided against the plaintiff, as it was found to be substantially dependent on issue No.1 and 2, and since the plaintiff has failed to prove the mortgage. Then deciding issue No.5 being the crucial issue, it was found, that from the evidence of the parties, including the admissions made

by D.W.2 Hara, it is clear, that even according to defendant, he came into the possession of the property from the plaintiff, on Chaitra Sud Ekam Samvat 2021, corresponding to 15.4.64, and it was found, that according to the plaintiff, it was a mortgage, while according to the witnesses of the defendant, it was by way of sale, but in either case, till then the plaintiff was taken to be the owner, from whom the property was taken, and since the documents are not registered, irrespective of the fact of it being sale or mortgage, it cannot confer any right on the defendant, to retain possession, and therefore, plaintiff was held entitled to get back the possession. Then issue No.6 was decided in favour of the plaintiff, by holding that the defendant has come into possession of the property on 15.4.64, while the suit has been filed on 4.8.71, which is well within 12 years. Then deciding issue No.7 it was found, that according to the estimate produced by D.W.4 Mahendra Chandra Singhvi, improvements worth Rs.8042/- have been made, and the effect thereof was decided in issue No.8, by holding, that there is nothing to show, that it was done within the knowledge of the plaintiff, nor does it confer any title on the defendant, and therefore, it is of no benefit to the defendant. With these findings, issue No.9 was decided in the manner, that the plaintiff was held entitled to possession on payment of Rs.550/-, to the defendant No.1. In appeal, the learned lower Appellate Court upheld the decision on issue No.1, 2

and 4. Regarding issue No.3, it was held, that so far the suit for redemption is concerned, the court fees was rightly paid, valuing the suit at Rs.550/-, according to Section 32(8) of the Rajasthan Court Fees and Suits Valuation Act, and that, so far as the other alternative relief is concerned, it was held, that where the plaintiffs claim relief on two basis, then the Court has jurisdiction to hear the suit, if it has jurisdiction to hear on either of the grounds. Then the findings of the trial Court on issues No.5, 6, 7, 8 and 9 were maintained.

This appeal was admitted on 28.7.99, by framing the following substantial questions of law:-

"(i) WHETHER the question of payment of court-fee can be raised by the defendant-appellants in second appeal where it touches the pecuniary jurisdiction of the court?

(ii) WHETHER in the present case, the plaintiff-respondents were required to pay separate court-fee for the reliefs sought by them even if in alternative?

(iii) WHETHER the plaintiffs suit can be decreed without seeking a relief of declaration of title?

(iv) WHETHER before handing over possession of the disputed premises to the plaintiff-respondents, the defendant-appellants are entitled to remove their fixtures?"

Arguing the appeal, relying upon the three judgments of this Court, being in Mahadeo Vs. Hanuman Mal reported in RLW 1969 241, State of Rajasthan Vs. Nirmla

Devi reported in 2000(3) WLN 147, and Jugal Kishore Vs. Bankat Lal & Ors. reported in 1997(1) WLN (Raj.) 532, it was contended, that even where the alternative reliefs are claimed by the plaintiff, or the relief is claimed on the two grounds, or two reliefs are claimed, then the court fees is to be payable on the highest of the value of the relief/s, as the case may be. In the present case, the plaintiff had filed the suit for redemption but in the alternative, pleading that the defendant has denied the factum of mortgage, the possession was sought on the basis of plaintiffs' title, and therefore, in view of the provisions of Section 29 of the Rajasthan Court Fees and Suits Valuation Act, the court fees on the market value of the property was required to be paid. The other argument made was, that the plaintiff has not prayed for any decree of declaration of his title, in absence of such a prayer decree for possession could not be passed.

Learned counsel for the respondent submitted, that the two learned Courts below have decided the question of court fees in favour of the plaintiff, and if this Court feels or finds, that the court fees was deficit, then the plaintiff is prepared to pay such court fees, as may be found payable by this Court. In my view, this decides the controversy on the aspect of court fees. From the judgments cited by learned counsel for the appellant, it is clear, that since in the present case the plaintiff had also

sought possession of the property on the basis of the title, in view of Section 29 of the Rajasthan Court Fees and Suits Valuation Act, the court fees is required to be paid on the market value of the suit property. In para-12 of the written-statement, the appellant had claimed the market value of the property to be Rs.6000/-. Likewise, in para-2, he had pleaded to have spent Rs.5000/-. Thus, when even according to the defendant, the market value of the property, at that time was claimed Rs.6000/-, which fact has not been disputed by the plaintiff, in my view, the plaintiff should be called upon to pay court fees on the valuation of the property, being Rs.6000/-. The court fees on that amount comes to Rs.450/-, out of which, the court fees of Rs.41.25 Paisa has already been paid, the plaintiff is therefore required to be directed to pay the balance deficit court fees, being Rs.408.75 Paisa.

Another objection raised by the learned counsel for the appellant was, that since the valuation of the property was Rs.6000/-, at that time, the pecuniary jurisdiction of the Munsiff Court was only to the extent of Rs.5000/-, learned trial Court had no jurisdiction whatever, to try the present suit much less to decree it.

True it is, that in para-12 of the written-statement, so also in para-4 of the additional pleas, an objection in this regard had been taken, and on this

question issue No.3 had been framed by the learned trial Court. As noticed above, the learned trial Court had decided the issue, by holding, that since the plaintiff had asked for his original property, increased valuation is not a relevant factor for determining the jurisdiction of the Court. Then the learned lower Appellate Court has decided this issue by holding, that if one of the reliefs claimed is within pecuniary jurisdiction of the Court, it cannot be said that the Court has no jurisdiction. In my view, the reasonings given by both the learned Courts below, on this issue are not supportable by law. The suit being a suit for possession, on the basis of title, the market value of the property decides pecuniary jurisdiction, simply because the plaintiff had asked the relief for redemption, if he has claimed decree for possession on the basis of title, then mere fact that redemption is also claimed, jurisdiction cannot be restricted to the Court, having jurisdiction to try the suit, on the basis of lower or less valuation. Thus, this objection raised by learned counsel for the appellant has force, however, a look at the provisions of Section 21 C.P.C. shows, that such objection cannot be allowed by me in second appeal, unless it is shown that there has been consequential failure of justice. As is clear on the bare language of sub-section (2) of Section 21 CPC, which reads as under:

"21. Objection to jurisdiction.-(1) No objection as

> to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.
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> (2) No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and, in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice."

In the present case, there is no ground taken in the appeal, nor any submission has been made, to show, as to how there has been consequential failure of justice. In that view of the matter, this objection does not help the appellant on merits.

So far as contention about plaintiff having not prayed for declaration of title, in my view, this contention, in the present case, has no substance. As found by the two learned Courts below, while deciding issue No.5, that even according to the defendant and his witnesses, specially D.W.2 Hara, that the defendant had come into possession of the property from the plaintiff, and only on the date as contended by the plaintiff, and has failed to prove to be the owner, and in possession of the property since beginning, as pleaded in the written-statement. The controversy has been comprehended by learned Courts below

to be, that according to the plaintiff, the appellant came into possession as usufructory mortgagee, while according to the appellant, he came into possession as a purchaser. For coming to this conclusion, about nature of controversy, the learned Courts below have relied upon the circumstances, like suggestions made to the plaintiff's witnesses, list of documents filed on the side of the defendant, about the document of purchase of the property for a sum of Rs.550/- being dated Chaitra Sud Ekam Samvat 2021, and in that background, has appreciated the evidence, and came to the conclusion, that even according to D.W.2, before this purchase of the property by the present appellant, appellant's father was living in some other property, and that before the defendants started living in this Nohra, the Nohra was of Parasram (the plaintiff No.1), who used to tether his cattle (horses and donkeys). That being the position, when it is not in dispute, as appearing from the evidence of D.W.2, that earlier the property was of Parasram, the only question, that was required to be examined was, as to whether the appellant is entitled to retain possession of the property under law, and since it has been found, that irrespective of the question, as to whether the transaction was mortgage, or sale, in view of the fact, that the document was not registered, it does not confer any right or title on the appellant. It is a different story, that the theory of the transaction being mortgage has already been disbelieved by the two learned

Courts below. In that view of the matter, in the circumstances of the present case, it cannot be said, that without asking for a decree for declaration of title, the plaintiff could not ask for the decree for possession.

Nothing was submitted by the learned counsel for the appellant about the fourth substantial question of law, as framed.

Thus, while upholding the decree for possession granted by two learned Courts below, it is directed, that the plaintiff should pay the deficit court fees of Rs.408.75 Paisa, before executing the decree.

The appeal is accordingly disposed of.

(N P GUPTA),J.

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